4594 (21)

No. 05-848

FILED
SEP 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

---

ENVIRONMENTAL DEFENSE, ET AL.,
*Petitioners,*

v.

DUKE ENERGY CORPORATION,
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

## BRIEF OF ELECTRIC UTILITY INDUSTRY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION

---


STEVEN G. MCKINNEY
MICHAEL D. FREEMAN
P. STEPHEN GIDIERE III *
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 2600
Birmingham, Alabama 35203
(205) 251-8100

* Counsel of Record

*Counsel for Amici Curiae American Electric Power Company, Inc., Edison Electric Institute, Southern Company, and Utility Air Regulatory Group*


September 15, 2006


WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTERESTS OF *AMICI CURIAE* | 1 |
| SUMMARY OF THE ARGUMENT | 4 |
| ARGUMENT | 6 |
| I. AIR QUALITY IS IMPROVING | 6 |
| II. "MODIFICATION" IS A TERM OF ART WITH ONE MEANING UNDER THE CLEAN AIR ACT | 12 |
| A. Congress Directed EPA to Use the Same Definition of "Modification" Under NSR as Under NSPS | 13 |
| B. Canons of Construction Support the Fourth Circuit's Decision | 14 |
| 1. The Identical Term Maxim | 14 |
| 2. The Presumption of Ratification | 18 |
| III. CONGRESS INTENDED TO INCORPORATE INTO NSR THE NSPS CONCEPT OF "MODIFICATION" | 21 |
| A. The Existing Regulatory Regime Supports Incorporation | 21 |
| B. The Face of the Clean Air Act Supports Incorporation | 24 |
| C. Contemporaneous EPA Action Supports Incorporation | 26 |
| IV. THE STATUTE DOES NOT PROHIBIT AN HOURLY RATE TEST FOR NSR AND NSPS | 27 |
| CONCLUSION | 30 |

# TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) | 23 |
| *Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency*, 540 U.S. 461 (2004) | 4 |
| *ASARCO Inc. v. Envtl. Prot. Agency*, 578 F.2d 319 (D.C. Cir. 1978) | 30 |
| *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932) | 16 |
| *Bragdon v. Abbott*, 524 U.S. 624 (1998) | 18, 19 |
| *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) | 14 |
| *Comm'n of Internal Revenue Serv. v. Keystone Consol. Indus. Inc.*, 508 U.S. 150 (1993) | 15, 18 |
| *Comm'n of Internal Revenue Serv. v. Lundy*, 516 U.S. 235 (1996) | 14 |
| *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) | 18 |
| *Dist. of Columbia v. Carter*, 409 U.S. 362 (1973) | 16 |
| *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997) | 2 |
| *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) | 16 |
| *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) | 18 |
| *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995) | 15 |
| *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84 (1934) | 16 |
| *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005) | 15 |
| *Lorillard v. Pons*, 434 U.S. 575 (1978) | 18, 26 |
| *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) | 18 |
| *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267 (1974) | 25 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *New York v. Envtl. Prot. Agency*, 413 F.3d 3 (D.C. Cir. 2005) | *passim* |
| *Ratzlaf v. United States*, 510 U.S. 135 (1994) | 15 |
| *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) | 17 |
| *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309 (11th Cir. 1999) | 2 |
| *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), *overruled in part on other grounds by Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) | 20 |
| *Sullivan v. Stroop*, 496 U.S. 478 (1990) | 15 |
| *Train v. Natural Resource Defense Council, Inc.*, 421 U.S. 60 (1975) | 12 |
| *United States v. Alabama Power Co.*, No. 01-0152, Order on United States' Motion for Clarification (N.D. Ala. Aug. 28, 2006) | 16 |
| *United States v. Cinergy Corp.*, No. 06-1224 (7th Cir. Aug. 17, 2006) | 10, 15, 16, 17 |
| *United States v. Giancola*, 783 F.2d 1549 (11th Cir. 1986) | 12 |
| *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1867) | 14 |
| *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) | 4 |
| *Wachovia Bank v. Schmidt*, 126 S. Ct. 941 (2006) | 16 |


STATUTES


| | |
|---|---|
| 42 U.S.C. § 7409 | 9 |
| 42 U.S.C. § 7410 | 7 |
| 42 U.S.C. § 7410(a)(2)(D) | 13 |
| 42 U.S.C. § 7410(a)(4) | 13 |
| 42 U.S.C. § 7411 | 19 |
| 42 U.S.C. § 7411(a) | 20 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 42 U.S.C. § 7411(a)(4) | 13, 17 |
| 42 U.S.C. § 7412(a)(5) | 30 |
| 42 U.S.C. § 7470 | 17 |
| 42 U.S.C. § 7478 | 25 |
| 42 U.S.C. § 7478(a) | 25 |
| 42 U.S.C. § 7478(b) | 25 |
| 42 U.S.C. § 7479(2)(C) | 13 |
| 42 U.S.C. § 7479(3) | 25 |
| 42 U.S.C. § 7491 | 7 |
| 42 U.S.C. § 7492 | 7 |
| 42 U.S.C. § 7501(4) | 13, 28 |
| 42 U.S.C. § 7502(c)(3) | 29 |
| 42 U.S.C. § 7521(a) | 29 |
| 42 U.S.C. § 7521(b)(1)(B) | 29 |
| 42 U.S.C. §§ 7651-7651o | 7, 12 |
| 42 U.S.C. § 7651 | 10 |
| 42 U.S.C. § 7651(b) | 11 |
| 42 U.S.C. § 7651c | 10 |
| Pub. L. No. 95-190, 91 Stat. 1393 (1977) | 20 |
| Pub. L. No. 101-549, 104 Stat. 2584 (1990) | 10 |
| REGULATIONS | |
| 40 C.F.R. § 52.01(d) | 23 |
| 40 C.F.R. § 52.01(f) (1974) | 25 |
| 40 C.F.R. § 52.21(b)(7) (1974) | 25 |
| 40 C.F.R. § 60.2(h) | 21, 22, 24 |
| 40 C.F.R. § 60.14 | 19, 21, 22 |
| 40 C.F.R. § 60.14(b) | 21 |
| 40 C.F.R. § 60.14(h) | 30 |
| N.Y. COMP. CODES R. & REGS. tit. 6, §§ 231-2.3(a) | 28 |
| 25 PA. CODE § 127.211(a) | 28 |
| 25 PA. CODE § 127.211(c)(1) | 28 |

TABLE OF AUTHORITIES—Continued


FEDERAL REGISTER — Page

39 Fed. Reg. 36,946 (Oct. 15, 1974) ..... 22, 28, 30
39 Fed. Reg. 42,510 (Dec. 5, 1974) ..... 23, 24
40 Fed. Reg. 58,416 (Dec. 16, 1975) ..... 19, 23, 30
43 Fed. Reg. 26,388 (June 19, 1978) ..... 26
49 Fed. Reg. 43,211 (Oct. 26, 1984) ..... 27
57 Fed. Reg. 32,339 (July 21, 1992) ..... 30
63 Fed. Reg. 57,356 (Oct. 27, 1998) ..... 7, 12
64 Fed. Reg. 35,713 (July 1, 1999) ..... 7
68 Fed. Reg. 61,269 (Oct. 27, 2003) ..... 12, 27
70 Fed. Reg. 25,162 (May 12, 2005) ..... 7
70 Fed. Reg. 28,606 (May 18, 2005) ..... 7, 9
70 Fed. Reg. 39,104 (July 6, 2005) ..... 7
70 Fed. Reg. 61,081 (Oct. 20, 2005) ..... *passim*

LEGISLATIVE MATERIALS

S. Rep. No. 95-127 (May 10, 1977) ..... 3
S. Rep. No. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3672-73 ..... 10
H.R. Rep. No. 101-490 pt.1 (1990) ..... 10
123 Cong. Rec. 36,252 (1977) ..... 20

OTHER AUTHORITIES

*Air Quality and Electricity: Enforcing New Source Review*, Larry B. Parker and John E. Blodgett, CRS Resources, Science, and Industry Division, RL30432 (Jan. 31, 2000), *available at* ncseonline.org/nle/crsreports/air/air-35.cfm ..... 6, 8

Department of Energy, Energy Information Administration, Annual Energy Review 2005, *available at* www.eia.doe.gov/emeu/aer/pdf/aer.pdf ..... 1

TABLE OF AUTHORITIES—Continued

Page

EEI Comments on 2005 Emission Increase Rule, EPA-HQ-OAR-2005-0163-0122.1 (Feb. 17, 2006) ..... 8

National Acid Precipitation Assessment Program Report to Congress: An Integrated Assessment, *available at* www.napap.noaa.gov/reports ..... 8

NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 53:01 (6th ed. 2000) ..... 20

Regulatory Impact Analysis of the Clean Air Interstate Rule: Final Report, 2060-AJ65 (Mar. 1, 2005), *available at* www.epa.gov/interstateairquality/impact.htm#economic ..... 8

Statement of Steve Johnson, Acting EPA Administrator (Mar. 10, 2005), *available at* www.epa.gov/interstateairquality/ ..... 9

Testimony of William F. Tyndall, before the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety, Committee on Environmental Environment and Public Works, United States Senate (Oct. 14, 1999), *available at* epw.senate.gov/107th/tyn_1014.htm ..... 8

U.S. Environmental Protection Agency, Air Emissions Trends—Continued Progress Through 2005, *available at* www.epa.gov/airtrends/2006/econ-emissions.html ..... 7

## INTERESTS OF *AMICI CURIAE*

This case is not just about one utility company. The theory of the Clean Air Act advanced by Petitioners would subject a large segment of the electric generating capacity in this country—nearly 70% of it[1]—to costly, duplicative, and potentially debilitating regulatory review requirements. And, despite Petitioners' rhetoric, such action is not necessary to protect public health and the environment—the nation's air quality is improving and will continue to do so without accepting Petitioners' position on New Source Review ("NSR").

This brief is filed by American Electric Power Company, Inc. ("AEP"), Edison Electric Institute ("EEI"), Southern Company, and Utility Air Regulatory Group ("UARG") (collectively, "Electric Utilities")—entities with a vital interest in *both* providing the nation with a reliable supply of electricity *and* protecting and improving air quality.[2] AEP and Southern Company are two of the largest electric utility systems in the United States. AEP owns nearly 36,000 megawatts of electric generating capacity and serves a 197,500 square-mile service territory in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia. Southern Company owns more than 40,000 megawatts of electric generating capacity and serves a 120,000 square-mile service territory in Alabama, Florida, Georgia, and Mississippi. EEI is a trade association of United States shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. UARG is a non-profit, unincorporated trade association of individual

---

[1] About 50% of the nation's electricity comes from coal-burning units and about 18% from natural gas units, all of which could be subject to these requirements. *See* Department of Energy, Energy Information Administration, Annual Energy Review 2005, Table 8.2a, at 228, *available at* www.eia.doe.gov/emeu/aer/pdf/aer.pdf (last accessed Sept. 11, 2006).

[2] All parties have consented to the filing of this brief. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

electric utilities located throughout the country and of related industry trade associations.

Electric Utilities and their members operate steam electric generating units that produce electricity for individuals, businesses, and government entities across the country. These units are complicated machines consisting of thousands of separate parts and components operated in an integrated fashion to produce electricity. The failure of these parts—from the smallest valve to the largest boiler components—can result in unsafe and unreliable operation, including forced (emergency) shutdown.

A reliable and affordable supply of electric power is critical to public health and welfare.[3] Utilities are under both legal and practical obligations to maintain power plants and equipment at optimum levels of reliability and efficiency. As a result, the utility industry promptly repairs and replaces deteriorating and broken components to assure an uninterrupted supply of electricity to the public.

Petitioners claim that repair and replacement activities, like those Duke Energy did, are "major modifications" that trigger NSR's lengthy and burdensome permitting process solely because they maintain the continued availability and reliability of the units. That is not the law, and it is bad policy, too.

Congress enacted NSR—*New* Source Review[4]—to address new emissions *capacity*, not to delay or to discourage

---

[3] *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) ("[S]tate regulation of . . . sales to consumers serves important interests in health and safety in fairly obvious ways, in that . . . individual buyers . . . are not frozen out of their houses in the cold months."); *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) ("[A] steady supply of electricity during the summer months, especially in the form of air conditioning to the elderly, hospitals and day care centers, is critical.").

[4] NSR is called Prevention of Significant Deterioration ("PSD") in areas that meet air quality standards and Non-attainment New Source Review ("NNSR") in areas that do not. For simplicity's sake, this brief uses the general term "NSR" except where a distinction is appropriate.

maintenance and repair work at existing units. Congress explained in 1977 that NSR was being enacted in order to create a "mechanism [ ] to assure that before *new* or *expanded* facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S. Rep. No. 95-127, at 55 (May 10, 1977) (emphasis added).[5] To implement its intent, Congress chose to use an existing term with an established meaning—"modification"—to refer to the types of activity that would subject an existing source to NSR. That term meant at the time, and means today, a change that increases a unit's intrinsic capability to emit pollution (*i.e.*, its hourly emissions rate), not one that maintains the unit's ability to operate in the future as it was constructed and permitted to do. The Fourth Circuit's decision properly recognizes this distinction.

Not only does Petitioners' theory fly in the face of congressional intent, it makes no practical sense. Because existing facilities are extensively regulated under the Clean Air Act apart from NSR, and given the myriad factors that affect how an existing facility is operated (including customer demand, economic factors, weather, the availability of other units, grid congestion, and fuel costs), EPA has never defined "modification" based on variations in hours of operation within permitted capacity. Petitioners' focus on hours of operation thus ignores the practical reality of running a complex, integrated electric generating and transmission system.

Further, Petitioners' theory would have potentially debilitating effects on a significant portion of the nation's electric generating capacity. The activities being challenged by Petitioners are performed every year at power plants—both

---

[5] This 1977 Senate Report used the term "expanded" synonymously with "modified" in its discussion of the NNSR provisions of the reported bill—Senate Bill 252, § 13—which required pre-construction review for newly "constructed or modified" major emitting facilities.

old and new—across the country. Because NSR is a pre-construction permitting program (*i.e.*, a covered activity cannot be undertaken until a permit is obtained) and one round of permitting can last for years,[6] critical energy facilities would either be shut down or in a state of perpetual permitting if Petitioners had their way.[7] Congress clearly did not intend to condition the reliability of the country's electricity supply on a multi-year, overlapping permitting process.

## SUMMARY OF THE ARGUMENT

I. The electric utility industry has invested and will continue to invest billions of dollars to decrease air emissions from existing power plants and to comply with non-NSR provisions of the Clean Air Act. This investment has paid off—air emissions in this country have decreased dramatically and air quality has improved. Foisting Petitioners' theory of NSR onto existing sources is unnecessary to continue these improvements and would, in fact, be counterproductive. NSR is a program for controlling emissions *growth* from *new* sources. It is an inefficient mechanism for achieving significant emission reductions from existing sources.

II. Congress expressly directed that the term "modification" mean the same under NSR as under the existing New Source Performance Standards ("NSPS") program. In doing so, Congress focused NSR on "new" or "expanded" facilities, not existing ones that do not increase their constructed and permitted capacity to emit pollution. Given Congress' clear direction, EPA is prohibited from interpreting "modification"

---

[6] Just the NSR permitting process itself (not the work) can take years and cost hundreds of thousands of dollars. *See Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency*, 540 U.S. 461, 516-17 (2004) (Kennedy, J., dissenting).

[7] The sheer number of allegations made against the industry proves this point. For example, in *United States v. Ohio Edison Co.*, the government alleged that a single plant should have applied for eleven NSR permits in a fourteen-year span. 276 F. Supp. 2d 829, 823-33 (S.D. Ohio 2003).

differently for the two programs. The Fourth Circuit's decision to this effect thus follows the plain language of the statute and, in addition, is supported by well-established canons of statutory construction. Because Congressional intent here is clear, that is the end of the matter.

III. All of Petitioners' arguments to the contrary easily yield upon scrutiny. For example, Petitioners' argument that Congress could not have intended to incorporate the NSPS regulatory definition of "modification" into the statutory NSR provisions is based on a misreading of the regulatory and legislative record. Specifically, in 1977 there was but one single meaning of "modification" under the NSPS and the NSR rules in force at the time: it was (and is) a change that increases a facility's maximum emissions rate, unaffected by hours of operation. The unique backdrop of the 1977 amendments—where Congress had before it EPA's existing NSR regulatory program and reviewed it provision by provision, adopting some and changing others—provides irrefutable evidence of Congress' intent. Under the statutory NSR program, Congress wanted "modification" to mean the same as under those pre-existing EPA rules. This conclusion is confirmed by EPA's own contemporaneous interpretation of the statute, as set forth in the very first NSR rules enacted after the 1977 amendments—an interpretation that EPA has reaffirmed over the years.

IV. Finally, contrary to Petitioners' claim, the hourly rate test used to trigger both NSPS and NSR *is* based on "actual" emissions, as EPA has explained. More fundamentally, that test has been in the NSPS rules for thirty-five years. To suggest now, as do Petitioners, that the NSR rules cannot use the same test for "modification" as NSPS, when the statute plainly requires the same definition of that term in NSR as in NSPS, defies common sense.

## ARGUMENT

### I. AIR QUALITY IS IMPROVING

Despite the rhetoric of Petitioners and their supporters,[8] reversal of the Fourth Circuit is not the *sine qua non* to decreasing emissions and improving the nation's air quality. Irrespective of the outcome here, the trend of decreased emissions and improved air quality that has occurred over the past three decades will continue apace. As EPA has acknowledged, NSR is not intended as a driver for decreasing emissions from existing sources:

> [T]he primary purpose of the major NSR program is *not* to reduce emissions, but to balance the need for environmental protection and economic growth. *That is, the goal of major NSR is to minimize emissions increases from new source growth.*

70 Fed. Reg. 61,081, 61,088/1 (Oct. 20, 2005) (emphasis added). EPA is not alone in this view. Prior to this suit, the Congressional Research Service explained that NSR was not aimed at emission reductions from existing sources, nor is it an effective means of achieving such reductions.[9]

---

[8] *See, e.g.*, Pet. Br. at 26 (claiming the Fourth Circuit "immunized" modernization projects from review, to the determent of local air quality); New York Br. at 3 (claiming the Fourth Circuit's decision will have "dire ramifications" to public health); STAPPA & ALAPCO Br. at 5 (asserting the Fourth Circuit's decision will "exempt all . . . existing industrial sources" from installing modern pollution controls).

[9] *See Air Quality and Electricity: Enforcing New Source Review*, Larry B. Parker and John E. Blodgett, CRS Resources, Science, and Industry Division, RL30432 (Jan. 31, 2000), *available at* ncseonline.org/nle/crsreports/air/air-35.cfm (last accessed Sept. 11, 2006) [hereinafter *CRS Report*] ("NSR was one approach that the Clean Air Act took to control emissions from existing sources, but arguably more efficient and more effective methods to ensure declining emissions from existing sources over time have been developed since NSR provisions were added to the CAA in 1977. For example, title IV of the CAA, enacted in 1990, explicitly and substantially reduces $SO_2$, and $NO_x$ emissions from existing utility plants. . . . The 'cap and trade' program has had 100% compliance

Simply put, NSR is *not*, and was never intended to be, an emissions reduction program; it is a growth management program. Substantial emission reductions have been and will continue to be achieved by subjecting existing sources (like Duke Energy's) to a host of *other* non-NSR Clean Air Act programs, including: state implementation plans that are specifically designed to meet or exceed federal air quality standards, 42 U.S.C. § 7410; visibility protection programs, *id.* §§ 7491-92;[10] the Title IV Acid Rain Program, *id.* §§ 7651-7651o; regional $NO_x$ trading programs ("$NO_x$ SIP call"), 63 Fed. Reg. 57,356 (Oct. 27, 1998); the Clean Air Mercury Rule ("CAMR"), 70 Fed. Reg. 28,606 (May 18, 2005); and the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25,162 (May 12, 2005)—all of which are more efficient at reducing emissions and improving air quality than NSR. *See* 70 Fed. Reg. at 61,083/2 (describing "the substantial emissions reductions from other CAA requirements that are more efficient than major NSR"). These are the programs that effectively control emissions from existing sources yet Petitioners act as if they do not exist.

These non-NSR programs are working. Under them, the utility industry has dramatically reduced emissions, while at the same time satisfying the steadily increasing American appetite for electricity. Recently, EPA documented this progress in a report entitled "Air Emissions Trends—Continued Progress Through 2005." According to EPA's findings, since 1970, air emissions have decreased 53%. At the same time, the country's gross domestic product has risen 195%, and energy consumption has increased 48%.[11] EPA recognizes

---

(indeed, substantial over-compliance); the implicit logic of EPA's lawsuits suggests NSR's compliance has been near zero.").

[10] *See also* 64 Fed. Reg. 35,713 (July 1, 1999) (Regional Haze Regulations); 70 Fed. Reg. 39,104 (July 6, 2005) (Clean Air Visibility Rule).

[11] U.S. Environmental Protection Agency, Air Emissions Trends—Continued Progress Through 2005, www.epa.gov/airtrends/2006/econ-emissions.html (last accessed Sept. 11, 2006).

that the "reductions in national emissions for the utility sector are especially significant considering that national capacity continues to increase." 70 Fed. Reg. at 61,087. Going forward, the utility industry is on track to reduce its emission rates by about 90% (compared to 1980) upon implementation of CAIR, CAMR, and the Clean Air Visibility Rule.[12] The fact is, the nation's air is getting cleaner—and it has nothing to do with NSR. *See CRS Report* ("[T]itle IV reduced more $SO_2$ emissions from coal-fired electric generating facilities in its first year of implementation (1995) than NSR has in its 20 years of existence.").

These reductions have not come without a price. The utility industry has invested tens of billions of dollars in advanced, state-of-the-art air pollution control technologies over the past thirty years. For example, between 1976 and 1996, electric utilities spent over $32 billion for air pollution control equipment.[13] The utility industry continues to spend billions of dollars just to comply with the Acid Rain Program.[14] The annual costs to comply with CAIR alone are projected to be $2.9 billion by 2010 and $3.7 billion by 2015.[15] EPA estimates the annual costs of CAMR to the

---

[12] *See* EEI Comments on 2005 Emission Increase Rule, EPA-HQ-OAR-2005-0163-0122.1 (Feb. 17, 2006).

[13] *See* Testimony of William F. Tyndall, before the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety, Committee on Environmental Environment and Public Works, United States Senate (Oct. 14, 1999), *available at* epw.senate.gov/107th/tyn_1014.htm (last accessed Sept. 11, 2006).

[14] *See* National Acid Precipitation Assessment Program Report to Congress: An Integrated Assessment, at 13, *available at* www.napap.noaa.gov/reports (last accessed Sept. 11, 2006).

[15] *See* Regulatory Impact Analysis of the Clean Air Interstate Rule: Final Report, 2060-AJ65 (Mar. 1, 2005), *available at* www.epa.gov/interstateairquality/impact.htm#economic (last accessed Sept. 11, 2006).

power industry to be $160 million in 2010, $100 million in 2015, and $750 million in 2020.[16]

Importantly, this lawsuit and others like it primarily involve plants located in areas that are *in attainment* for regulated pollutants—*i.e.*, where air quality meets or exceeds the National Ambient Air Quality Standards ("NAAQS") set by EPA to protect public health and the environment.[17] Not only will the air quality in these areas be protected and improved by existing non-NSR regulatory programs, but the air quality in non-attainment areas will as well. For example, in 1998, EPA promulgated rules (known as the "$NO_x$ SIP Call") that required twenty-one states in the eastern United States (including North and South Carolina where Duke operates) to reduce $NO_x$ emissions that contributed to non-attainment in downwind states. The $NO_x$ SIP Call has resulted in the installation of a large number of selective catalytic reduction devices ("SCRs") on existing coal-fired boilers. *See* 70 Fed. Reg. at 61,084/2. Further, in May 2005, EPA promulgated CAIR to reduce interstate transport of both $SO_2$ and $NO_x$. CAIR, according to EPA, "will result in the largest pollution reductions and health benefits of any air rule in more than a decade."[18] CAIR does so by establishing statewide emission reduction requirements for $SO_2$ and $NO_x$ in the eastern United States, which EPA expects to be achieved through the installation of scrubbers and SCRs on many existing sources. *See id.* at 61,085/2. EPA estimates CAIR will result in emissions reductions from these sources

---

[16] *See* 70 Fed. Reg. at 28,639.

[17] And, if EPA ever concludes that the existing NAAQS are inadequate to protect human health, it has the power and obligation to revise them through rulemaking. *See* 42 U.S.C. § 7409.

[18] Statement of Steve Johnson, Acting EPA Administrator (Mar. 10, 2005), *available at* www.epa.gov/interstateairquality/ (last accessed Sept. 11, 2006).

of roughly 73 percent for $SO_2$ and 61 percent for $NO_x$ *from 2003 levels.*[19]

The circumstances surrounding Congress' adoption of just one of these non-NSR programs—the Acid Rain Program—solidifies the fact that Congress never envisioned NSR as a driver for the kind of significant emissions reductions Petitioners say it must produce. The Acid Rain Program was added to the Clean Air Act in 1990, more than a decade after Congress passed NSR in 1977. Pub. L. No. 101-549, 104 Stat. 2584 (codified at 42 U.S.C. §§ 7651-7651o). The stated purpose of the legislation was to require significant emissions reductions from *existing* coal-fired power plants, the so-called "grandfathered" units. *See* 42 U.S.C. § 7651. Congress referenced many of these units by name and established in the statute new emissions limits reflecting a fundamental premise that existing permitting requirements (*i.e.*, NSR) could not be expected to achieve the desired emissions reductions. *Id.* § 7651c. In fact, EPA itself told Congress that new legislation was needed to deal with existing sources:

> Some have suggested that the existing law is adequate to deal with interstate air pollution. *The most persuasive argument that it is not, is the EPA's own analysis of the options available under existing law.*

S. Rep. No. 101-228, at 288-89 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3672-73 (emphasis added); *see also* H.R. Rep. No. 101-490 pt.1 at 362-64 (1990).[20] Following EPA's advice,

---

[19] *See* 70 Fed. Reg. at 61,085/2-3.

[20] In *United States v. Cinergy Corp.*, No. 06-1224, slip op. at 5 (7th Cir. Aug. 17, 2006), the Seventh Circuit said, without any citation, that "there is an expectation that old plants will wear out and be replaced by new ones that will be subject" to more stringent new source controls. The lack of citation is not surprising, given that nothing in the statutory language indicates such an "expectation." If there is any "expectation" reflected in the statute, it is that Congress thought that something other than NSR was required to mitigate acid-rain forming pollutants because the law does not require existing plants to retire at any particular age.

Congress enacted Title IV to make specific power plants (including the very ones at issue here) reduce $SO_2$ emissions by 10 million tons per year and $NO_x$ emissions by 2 million tons per year from 1980 levels. *See* 42 U.S.C. § 7651(b).

It is against this backdrop that Petitioners argue Congress intended some radically new and different meaning be given the term "modification" when it enacted NSR in 1977 that would cure the nation's alleged air quality woes. Forget for a moment that Congress said explicitly in the statute that "modification" was to mean the same as it always had under the Clean Air Act (discussed below)—Petitioners' proposition does not square with the monumental efforts that Congress, EPA, and the utility industry have undertaken to reduce emissions from existing sources. Petitioners would have this Court believe, for example, that at the same time Congress enacted Title IV in 1990 (to achieve reductions from power plants that existing law was not "adequate to deal with"), both EPA and Congress knew that these same plants should have been "un-grandfathered" under the NSR "modification" rule the first time a repair was made to maintain reliability, and then repeatedly with every subsequent repair. Their claim simply does not comport with the facts—or common sense.

Title IV and the other non-NSR programs are doing exactly what EPA and Congress intended—dramatically reducing emissions from existing sources. This progress should be allowed to continue without disruption. Petitioners' view of the Clean Air Act would, as a practical matter, elevate NSR above these other more effective and efficient programs. What was intended as a mechanism to control emissions growth from new sources, would, under Petitioners' view, be a dominant driver of emissions reductions from existing sources. Given its lengthy and costly permitting process and the realities of electricity generation, *supra* at 1-4, NSR is ill-suited to this task.

This is the crux of the dispute here between the parties. Under Petitioners' interpretation, Congress enacted the ultimate command-and-control program in 1977. Under their view of NSR, *every* existing electric generating unit should have long ago shut down or installed new source emissions controls, regardless of cost or whether such controls are even needed to meet or maintain EPA-established air quality standards. This is utterly incompatible with the major policy decisions that Congress and EPA have made for controlling utility industry emissions—namely, controls as determined by the states to meet local air quality concerns, *see Train v. Natural Resource Defense Council, Inc.*, 421 U.S. 60 (1975), and market-based cap-and-trade programs to address broader regional and national concerns, *see, e.g.*, 42 U.S.C. §§ 7651-7651o; 63 Fed. Reg. at 57,356. Petitioners' argument should be rejected because, as EPA put it, an interpretation of the modification provision under which "all major facilities eventually trigger NSR . . . cannot be squared with the plain language of the CAA." 68 Fed. Reg. 61,269, 61,273/2 (Oct. 27, 2003).

## II. "MODIFICATION" IS A TERM OF ART WITH ONE MEANING UNDER THE CLEAN AIR ACT

The Fourth Circuit properly concluded that Congress intended NSR and NSPS to share a common definition of "modification" and that EPA must interpret its NSR regulations accordingly.[21]

---

[21] As the Fourth Circuit and the district court explained, EPA's NSR rules were, contemporaneously with their promulgation, interpreted consistent with the existing NSPS rules. Pet. App. 15a n.7. It is, therefore, not a matter of the rules' validity, but of their interpretation consistent with congressional intent. *See United States v. Giancola*, 783 F.2d 1549, 1552 (11th Cir. 1986) ("[Courts] do not construe a regulation in a manner that would place it in conflict with the statute by which it is authorized . . . .").

### A. Congress Directed EPA to Use the Same Definition of "Modification" Under NSR as Under NSPS

There is but one statutory definition of "modification" for all of the Clean Air Act's new source programs.

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4). This definition was formulated by Congress in 1970 when it enacted the first of the new source programs under the Clean Air Act—the New Source Performance Standards or "NSPS." It is the only definition of "modification" Congress has ever written for the statute's new source programs. From the beginning, this single definition has applied as a trigger both to the NSPS technology-based standards *and* new source review, both of which were required in the 1970 amendments (Petitioners conveniently ignore this latter point). *See id.* §§ 7410(a)(2)(D), (a)(4) (1970) (establishing a program for the review of the location of new sources, prior to their "construction or modification"). The 1977 amendments continued to use this single term and definition to trigger *both* the control technology and pre-construction review portions of the new source programs.

When it enacted the statutory NSR program in 1977, Congress did not rewrite the definition of "modification" or change it in any way to reflect any different goals or purposes. Nor did Congress simply repeat the statutory NSPS definition of "modification" in the new NSR provisions. Instead, Congress made the deliberate choice to cross-reference and incorporate the existing definition of "modification" and specified that the term shall have but one *meaning*. *Id.* § 7479(2)(C) ("The term 'construction' . . . includes the modification (as defined in section 7411(a) . . . ."); *id.* § 7501(4) ("The terms 'modifications' and 'modi-

fied' mean the same as the term 'modification' as used in section 7411(a)(4) of this title.").

The text of the Clean Air Act is clear and unambiguous: "modification" for NSR is the same as defined for NSPS. Canons of construction are not necessary to discern this intent—the plain language is enough. *See United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867) ("If the language be clear it is conclusive. There can be no construction where there is nothing to construe.").

This case is thus altogether different from the typical "identical term" case (on which the Petitioners and United States focus), given that Congress directed that the same meaning and usage of "modification" apply in NSR as in NSPS. In other words, Congress made a deliberate textual choice *not* "to spill more ink," neither redefining "modification" nor even repeating the same definition in NSR. That choice must be given effect. The Fourth Circuit recognized this when it held that the presumption of uniform usage was, in this particular case, "effectively irrebutable." Pet. App. at 17a.

### B. Canons of Construction Support the Fourth Circuit's Decision

In determining Congress' intent, reviewing courts may employ, when necessary, traditional tools of statutory construction. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984). Here, it is not necessary to resort to any canons of construction or "presumptions" to discern Congress' intent. Congress said "modification" shall mean that same under NSR as under NSPS—period. But if the Court were to employ such canons, it would find that they, too, support the Fourth's Circuit's decision.

#### 1. *The Identical Term Maxim*

It is a general rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Comm'n of Internal Revenue Serv. v. Lundy*, 516 U.S. 235, 250 (1996). This Court regularly relies

on this maxim to give words uniform meaning across a statute. *See, e.g., id.* at 249-50 (giving the term "claim" a consistent meaning under 28 U.S.C. §§ 6511 and 6512); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (construing "prospectus" as having identical meaning under § 10 and § 12 of the Securities Act of 1933); *Comm'n of Internal Revenue Serv. v. Keystone Consol. Indus. Inc.*, 508 U.S. 150, 159 (1993) (giving the term "sale or exchange" identical meaning under different provisions of the Internal Revenue Code).

Thus, even if this were simply a case where Congress had repeated the word "modification" in different parts of the statute, or repeated the operative words in the definition of "modification" elsewhere without further direction, the presumption would be in favor of identical meaning. But, this case involves much more than simply the "same word" used in two parts of the same statute.

Here, there is but a single formulation of the definition of "modification," making the case for identical meaning stronger. *Ratzlaf v. United States*, 510 U.S. 135, 143 (19 4) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a *single* formulation . . . the same way each time it is called into play." (citations omitted)). Further, there is a definitional cross-reference between two sections of the same Act, which heightens the presumption of identical meaning. *See IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 523-24 (2005) (recognizing heightened presumption of identical meaning where term "principal activities" explicitly referenced in separate section of the Act); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (giving uniform meaning to term "child support" in two sections of same Act which cross-reference each other).

Nonetheless, Petitioners and the United States insist on treating this case as a simple "identical term" case. Pet. Br. at 44-45; U.S. Br. at 39-46. The Seventh Circuit makes the same mistake. *Cinergy Corp.*, slip op. at 7-9. They do so in

order to invoke the caveat that "the same word might well be used in one sense in one part of a statute and another sense in another." *E.g.*, *id.* at 8. The cases they rely on, however, are inapposite as none of them involve an express cross-reference to a single definitional formulation as is the case here. *See Wachovia Bank v. Schmidt*, 126 S. Ct. 941 (2006) (concluding that the undefined word "located," for purposes of national banks, was properly interpreted differently in venue statute than in subject-matter jurisdiction statute); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (concluding that undefined word "age" could be interpreted differently under different provisions of ADEA); *Dist. of Columbia v. Carter*, 409 U.S. 362 (1973) (concluding that whether District of Columbia included as a "state or territory" depended upon particular statute at issue); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84 (1934) (concluding that undefined word "obligations" could have different scope in different sections of the Revenue Act of 1926).[22] The present case stands apart from these typical "identical term" cases because Congress has directly spoken to the issue. As succinctly explained by one federal district court faced recently with this very issue: "[Although] [t]he same word can mean different things in the same statute[,] when Congress says the word is to be defined in the new part of the statute as it was defined in the existing part of the statute, that's not vague. . . . Congress meant what it said, and a reviewing court . . . should not substitute[] the agency's judgment for Congress's." *United States v. Alabama Power Co.*, No. 01-0152, Order on United States' Motion for Clarification, at 6-7 n.7 (N.D. Ala. Aug. 28, 2006).

---

[22] This case is also not one where "the scope of the legislative power exercised in one [section] is broader than that exercised in another," so as to justify different meaning as in *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

Further, none of the Fourth Circuit's critics bother to explain how it is that Congress used "modification" in "one sense" in NSPS and "another sense" in NSR, as they claim did it. *See Cinergy Corp.*, slip op. at 8. To the contrary, Congress used "modification" in only one "sense"—*viz.* the "sense" in section 7411(a)(4), which it directed to be used for all subsequent new source programs. This is, therefore, not a case where the surrounding text or circumstances demand or even allow for a different meaning, as in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). In that case, the Court determined that the term "employees," defined generally under Title VII as "an individual employed by an employer," was broad enough to include both current and former employees depending upon the specific provision of Title VII using the term. As the Court explained, "Insofar as § 704(a) expressly protects employees from retaliation for filing a 'charge' under Title VII, and a charge under § 703(a) alleging unlawful discharge would necessarily be brought by a former employee, it is far more consistent to include former employees within the scope of 'employees' protected by § 704(a)." *Id.* at 345. There is no such context in the present case that would warrant or permit giving "modification" different meanings.

The only text of the statute identified by the United States as supporting different meanings is the opening "Congressional declaration of purpose" for the PSD provisions of NSR found at 42 U.S.C. § 7470. U.S. Br. at 46-47. But this general "goals and purposes" language is a far cry from the sort of explicit statutory context that would be necessary to overcome Congress' specific direction that "modification" mean the same in NSR as in NSPS. In fact, the United States does not even try to explain how interpreting "modification" the same for NSR as for NSPS would frustrate any goals or purposes, like restricting the term "employees" to only current employees would have done in *Robinson*. *See id.* at 47. The truth is that EPA does not believe it would—as evidenced by its recent proposed action to clearly bring the

emissions rate tests for NSR into conformity with NSPS. *See* 70 Fed. Reg. at 61,083/1 ("The proposed regulations would establish a uniform emissions test nationally under the NSPS and NSR programs. . . . We also do not believe the outcomes produced by the approach we have been taking [*i.e.*, in the NSR enforcement initiative] have significant environmental benefits compared with the approach we are proposing today."). Indeed, if NSR's air quality purposes can be achieved only by defining "modification" differently under the two programs, it would have been odd, to say the least, for Congress to have evinced such intent by explicitly directing that "modification" under NSR is "as defined in" and "the same as" NSPS.

### 2. *The Presumption of Ratification*

The presumption of ratification also supports the Fourth Circuit's decision. That canon of construction provides that Congress is presumptively aware of an existing regulatory definition of a term and is presumed to ratify that definition when adopting the same term in subsequent legislation. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

The presumption of ratification is a fundamental canon of construction often used in conjunction with canons regarding identical meaning. *See, e.g., Keystone Consol. Indus.*, 508 U.S. at 158-59. Congress is presumed to be aware of existing statutory and regulatory law at the time it enacts new legislation. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 133 n.4 (2002) (Congress presumed to be aware of HUD's existing interpretation of statutory term); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). And, when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law . . . ." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S.

575, 581-82 (1978). It thus follows that "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon*, 524 U.S. at 631.

The case for ratification here is compelling. At the time Congress cross-referenced and incorporated into NSR the existing definition of "modification" in section 7411 of the statute, EPA had already established a definition of the term—not simply for the NSPS rules—but for section 7411 of the Clean Air Act in general. EPA's rules provided (and still provide):

> (a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification *within the meaning of section 111 of the Act* [42 U.S.C. § 7411]. . . .
>
> (b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. . . .

40 C.F.R. § 60.14 (emphasis added); 40 Fed. Reg. 58,416, 58,419/1 (Dec. 16, 1975). Congress is thus presumed not simply to know what EPA said "modification" means under the NSPS rules, but also what EPA had determined "modification" meant for section 7411 of the Clean Air Act—specifically, an activity that increases the unit's emission rate in terms of kilograms *per hour* (*i.e.*, its emission rate, unaffected by operating hours). Against this backdrop, Congress specifically cross-referenced and incorporated section 7411's definition of "modification" into NSR. This is above and beyond "repetition of a well-established term," which alone would have been sufficient for congressional ratification.

The statute and the legislative record confirm, not contradict, ratification in this case. As EPA concedes, one need

look no further than the statutory language to see that, when Congress enacted NSR in 1977, it was well aware of the existing new source regulatory programs, which defined "modification" consistently for NSR and NSPS. *See infra* at 24-25. Further, Congress added "modification" to the list of construction activity that could trigger NSR permitting through a "technical and conforming" amendment some three months after the principal 1977 amendments were enacted. Pub. L. No. 95-190, 91 Stat. 1393, 1399 (1977). As Congress explained in the legislative history of those technical and conforming amendments: "It's not the purpose of these amendments to re-open substantive issues in the Clean Air Act." 123 Cong. Rec. 36,252 (1977). Instead, by its action, Congress intended to "conform" the NSR definition of modification to its "usage in other parts of the Act." *Id.* at 36,331. The only "usage" at the time was that found in section 7411(a), which EPA had interpreted in 40 C.F.R. § 60.14 and elsewhere to mean an increase in emission rate unaffected by hours of operation.

Thus, rather than reinventing the wheel, Congress simply incorporated an existing term *and its usage* into NSR. As the Fourth Circuit held, this action "indicates congressional concern with the same sort of simplicity and consistency that the *Rowan* Court discerned from the legislative history examined there." Pet. App. at 15a. Congress' deliberate choice in this regard must be given effect. *See Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (Black, J.) ("In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible . . . we must give effect to that intent."), *overruled in part on other grounds by Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *see also* NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 53:01, at 322-23 (6th ed. 2000) ("Written law is the product

of a more specific structure involving deliberate choice. . . . Harmony and consistency are positive values in a legal system because they serve the interests of impartiality and minimize arbitrariness. Construing statutes by reference to others advances those values.").

## III. CONGRESS INTENDED TO INCORPORATE INTO NSR THE NSPS CONCEPT OF "MODIFICATION"

Petitioners claim "there is [no] evidence" to support the conclusion that Congress intended to incorporate into the 1977 amendments the meaning of "modification" as that term had been implemented by EPA in the existing NSPS and NSR rules. Pet. Br. at 45 & n.34. They are mistaken.

### A. The Existing Regulatory Regime Supports Incorporation

Petitioners' argument against incorporation relies heavily on the D.C. Circuit's opinion in *New York v. Environmental Protection Agency*, 413 F.3d 3 (D.C. Cir. 2005). The D.C. Circuit's conclusion in that case that the "proposition [in *Bragdon*] does industry little good here," however, is based on two fundamental misperceptions: 1) "the NSPS regulations adopted in 1975 and in force at the time of the 1977 CAA Amendments" contained "two different (and possibly inconsistent) definitions of modification" and 2) "the regulatory definitions in the NSPS and PSD programs already differed at the time of the 1977 amendments." *Id.* at 19. These two assumptions by the court are demonstrably wrong.

First, the NSPS rules in force in 1977 did *not* contain "possibly inconsistent[] definitions of modification." The basis for this erroneous perception was that, as of 1977, 40 C.F.R. § 60.2(h) contained a general definition that tracked the statutory definition, whereas 40 C.F.R. § 60.14 provided a more detailed and specific definition. The court found it particularly significant that § 60.14(b) specified that "emis-

sion rate" was to be "expressed as kg/hr of any pollutant discharged into the atmosphere," whereas § 60.2(h) contained no such provision. *Id.* at 19-20. According to the court, "neither the 1975 regulation nor its preamble explained" what the court termed "two separate glosses on" the term "modification." *Id.* at 12.

To the contrary, EPA gave such an explanation when it proposed § 60.14 in 1974, stating that the term "modification" as "defined in [section 7411(a)(4)] of the Act as well as in 40 C.F.R. 60.2(h)" included "several terms and phrases" that were "not fully understood *outside the Agency*." *See* 39 Fed. Reg. 36,946, 36,946/2 (Oct. 15, 1974) (emphasis added). The purpose of the revisions, EPA said, was to "resolve any confusion that may exist as to what constitutes a modification," *id.*—that is, simply to clarify these "terms and phrases" in § 60.2(h).

In particular, EPA explained at considerable length that the rationale behind paragraph (b) of § 60.14 was to "clarify the phrase in the definition of modification 'increases the amount of any air pollutant.'" *Id.* at 36,946/3. In this respect, EPA noted, the "units kg/hr *automatically* allow increases in operating hours as intended by one of the *existing* exemptions under 40 C.F.R. 60.2(h)." *Id.* at 36,947/1 (emphasis added). In other words, according to EPA, the existing exclusion for increased "hours of operation" meant, by definition, that only a project that increased a source's hourly emission rate could constitute an NSPS modification.

Thus, as explained by EPA, the provisions of § 60.2(h) and § 60.14 have from their inception existed in complete harmony with each other and do not in any way represent "two separate glosses" on "modification." EPA has recently affirmed once again that "[w]e [EPA] did not create a new definition of modification in codifying § 60.14." 70 Fed. Reg. at 61,096/1.[23]

---

[23] In this *Federal Register* notice, EPA highlighted the regulatory history that the D.C. Circuit ignored and noted that it had "described the

Second, the regulatory definitions in the NSPS and PSD programs did *not* "already differ[] at the time of the 1977 amendments." 413 F.3d at 19.[24] The regulatory definition of "modification" in the PSD rules in force at the time of the 1977 amendments used an emission rate test just like NSPS and, just like the NSPS test, excluded increased hours of operation. 40 C.F.R. § 52.01(d). In fact, 40 C.F.R. § 52.01(d)—with its requirement for an emission rate increase unaffected by hours of operation—was, and continues to be, the only definition of "modification" found in the PSD rules.

EPA explained when it adopted § 52.01(d) that its goal was to create a "consistent" definition of "modification" for PSD and NSPS: "The general definition of modified source in Part 52 [PSD] is changed slightly to be more specific and to be consistent with the definition used in Part 60 [NSPS]. . . . It is the Administrator's intent to change the definition of modification under Part 52 to be consistent with the final definition of this term under Part 60." 39 Fed. Reg. 42,510, 42,513/1 (Dec. 5, 1974). That "final" definition, as discussed above, clarified that an increase in the "amount" of emissions is measured in terms of hourly emission rate. 40 Fed. Reg. 58,416 (Dec. 16, 1975).

Amici New York, *et al.*, attempt to downplay this regulatory history by suggesting that the NSPS definition promulgated in 1971 and in effect at the time § 52.01(d) was adopted "applied simply to 'increases [in] the amount of any air pollutant' with *no* reference to hourly emission rates." New York Br. at 11 n. 9. That is misleading. The 1971 NSPS

---

relationship between the provisions contained in §§ 60.2 and 60.14 in a 1974 Federal Register notice" where it had "stated that the regulations concerning modifications in § 60.14 clarify the phrase 'increases the amount of any air pollutant' that appears in the definition of modification in § 60.2." 70 Fed. Reg. at 61,088 n.24.

[24] These PSD rules were part of EPA's "pre-statutory" PSD program. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 346-49 (D.C. Cir. 1979).

rules also explicitly excluded increases in hours of operation from activities that could "increase" the "amount of emissions." *See* 40 C.F.R. § 60.2(h). Further, in its 1974 PSD rulemaking, EPA specifically referenced its contemporaneous, on-going NSPS rulemaking in which EPA had explained that the existing hours of operation exclusion in § 60.2(h) is equivalent to measuring an emissions increase in terms of hourly rate. *See* 39 Fed. Reg. at 36,947.

Thus, EPA did *not* create "confusion" in 1974 when it promulgated a definition of "modification" under its pre-statutory PSD program that "closely tracked—but didn't precisely mirror—the NSPS regulatory definition" adopted in 1971. *Cf. New York*, 413 F.3d at 12. Rather, EPA clearly expressed its intention at the time of promulgation that the regulatory PSD definition be "consistent with the definition" of modification used in the NSPS rules. 39 Fed. Reg. at 42,513/1.

### B. The Face of the Clean Air Act Supports Incorporation

Petitioners also argue that Congress' failure to incorporate the "modification" rule into the statute by express reference cuts against the presumption of incorporation. Pet. Br. at 46 n.35; *see also New York*, 413 F.3d at 19 ("Congress [in other sections] did incorporate regulatory provisions expressly by reference."). To the contrary, Congress did expressly validate the existing "modification" rule in 1977. Consider the unique backdrop to the 1977 amendments: Congress had before it EPA's pre-statutory PSD regulatory program and reviewed that existing program provision by provision, adopting some elements and changing others, either immediately or at some later date. One of the elements Congress did not change, and thus adopted, was the definition of "modification." The statute on its face demonstrates as much.[25]

---

[25] As EPA has observed, "[w]ith respect to NSR, there is no need to speculate about whether Congress knew about EPA's pre-existing regula-

Specifically, Congress expressly provided that, until such time as an implementation plan was approved for any area, the "applicable regulations under this chapter prior to August 7, 1977 [*i.e.*, the 1974 rules using "emission rate" unaffected by hours of operation] shall remain in effect," except as those rules were deemed automatically amended by operation of section 7478(b). 42 U.S.C. § 7478(a). The definition of the term "commenced" (a version of which was already in the 1974 rules, *see* 40 C.F.R. § 52.21(b)(7) (1974)) was one of the items that Congress said must be immediately changed to the new statutory definition. *See* 42 U.S.C. § 7478(b). The existing definition of "modification" was *not*. *See id.* Further, the definition of the phrase "best available control technology" (again, a version of which was already in the 1974 rules, *see* 40 C.F.R. § 52.01(f) (1974)) was changed in the new statute, *see* 42 U.S.C. § 7479(3), but the change was delayed until subsequent approval of an implementation plan. *See id.* § 7478. Again, the existing regulatory definition of "modification" was *not*. Repeatedly, Congress showed nothing but approval of, and an intention to continue, the existing definition and usage of "modification," while meticulously changing and fine-tuning other aspects of the program.

"[W]here Congress has re-enacted the statute without pertinent change," "*congressional failure to revise or repeal the agency's interpretation* is persuasive evidence that the interpretation is the one intended by Congress." *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974) (emphasis added). Such is the case here. In 1977, Congress effectively *did* "reenact" a portion of the Clean Air Act "without pertinent change" when it defined "modification" for NSR purposes to mean "modification" as defined in section 7411(a). When it did so, Congress had squarely

---

tions because, on the face of the statute, CAA section 168 demonstrates such awareness." EPA's Petition for Rehearing or Rehearing en Banc, *New York v. Envtl. Prot. Agency*, No. 03-1380, at 13 (May 1, 2006).

before it EPA's contemporaneous interpretation of "modification" as a change that increases an existing unit's emission rate unaffected by hours of operation. Congress chose not to "revise or repeal" this aspect of the rules, and its choice must be given effect. *Cf. Lorillard*, 434 U.S. at 481. (The "presumption" that Congress "had knowledge of the interpretation given to the incorporated law" is "particularly appropriate [where] Congress exhibited both a detailed knowledge of the [existing] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.").

### C. Contemporaneous EPA Action Supports Incorporation

EPA itself shares this view. For example, in the preamble to the first set of NSR rules promulgated by EPA after the 1977 amendments, EPA explained that its proposal "not to treat a voluntary fuel or raw material [switch] as a modification" had been opposed by environmental groups who asserted that "Congress intended all such switches to be treated as modifications." *See* 43 Fed. Reg. 26,388, 26,396/3 (June 19, 1978). EPA "disagree[d] with this contention" because "[section 7479(2)(C)] of the [Clean Air Act] by its reference to [section 7411(a)] in effect adopts the definition of 'modification' under [section 7411(a)] for the purposes of PSD." *Id.* "In adding [section 7479(2)(C)] to the Act, Congress indicated that it intended to conform the meaning of 'modification' to 'usage in other parts of the Act.'" *Id.* (quoting 123 Cong. Rec. H11957 (Nov. 1, 1977)). EPA found this significant because, as of the 1977 amendments, "*regulations* promulgated under section 7411 had defined 'modification' to exclude voluntary fuel switches" where the source had been "designed to accommodate that alternative use." *Id.* (quoting 40 C.F.R. § 60.14(e)(4)) (emphasis added). "Consequently," EPA said, "it would appear that Congress did not intend voluntary fuel switches to be treated as modifications for PSD purposes." *Id.* at 26,396-97.

In other words, within a year after enactment of the 1977 amendments, EPA determined that Congress intended "modification" under NSR to mean the same sort of activity that constituted "modification" under the NSPS program. In the case of voluntary fuel switches, EPA reasoned, because such activity was excluded from the NSPS regulatory definition of "modification," Congress must have intended that it be excluded from the definition of "modification" under the NSR program. By the same token, in 1977, the NSPS rules provided (and still today provide) that a change to an existing source would not constitute a "modification" unless that change increased the source's emission rate measured on an hourly basis. Accordingly, under EPA's logic, Congress must have intended that only such changes could trigger NSR.

EPA has repeatedly affirmed this view. For instance, in 1984, EPA said that the phrase "usage in other parts of the Act" in the legislative history "most probably refers, not only to section [7411(a)(4)], but also to the EPA regulations implementing [section 7411] that were in effect at the time." 49 Fed. Reg. 43,211, 43,213/3 (Oct. 26, 1984). More recently, EPA reiterated that, "by defining 'construction' in Part C to conform to usage in other parts of the Act," Congress in 1977 was referring to EPA's "preexisting rules interpreting the term 'modification' in the NSPS context." 68 Fed. Reg. at 61,269/2. This Court should give great weight to EPA's *contemporaneous* and *consistent* interpretation of the Clean Air Act.

## IV. THE STATUTE DOES NOT PROHIBIT AN HOURLY RATE TEST FOR NSR AND NSPS

Finally, Petitioners and their amici argue that the plain statutory text "requires that EPA 'apply NSR to changes that increase actual emissions . . . .'" Pet. Br. at 49 (quoting *New York*, 413 F.3d at 40). According to Petitioners, the "maximum hourly rate test" (that has been part of the NSPS definition of modification for over thirty years) "violates that command." *Id.* On that basis, Petitioners argue that the NSR

rules would "violate the plain text" of the statute if they were read consistent with the NSPS rules to apply only to activity that caused a facility's hourly emissions rate to increase. *Id.* Petitioners are wrong.[26]

As an initial matter, an hourly rate test *is* an actual test, as EPA has unequivocally and consistently stated. *See* 70 Fed. Reg. at 61,091 ("[A] test based on maximum achievable hourly emissions is a test based on actual emissions."); 39 Fed. Reg. at 36,946 ("[NSPS test] clarifies that for an existing facility to undergo a modification there must be an increase in actual emissions. . . . [T]he proposed definition of modification is limited to increases in actual emissions in keeping with the intent of section [7411] of controlling facilities only when they constitute a new source of emission."). This is why the United States does not support Petitioners' argument on this issue. U.S. Br. at 47-48 n.18.

But even if this Court concludes that the United States is wrong and an hourly emissions test is not an "actual" test, it does not follow that increased hours of operation must trigger NSR permitting. Petitioners' argument that the Clean Air Act's plain text requires a test for "modification" under which an "increase" must be read as an increase in operating hours within permit limits (or what Petitioners refer to as their "actual" annual emissions test), *see* Pet. Br. at 40, is incorrect, and to the extent *New York* supports such a conclusion, it is wrong. The word "emitted" in section 7411(a) simply does not carry the water *New York* suggests it does. *See* 413 F.3d at

---

[26] While the States of New York and Pennsylvania likewise argue that the plain meaning of the Clean Air Act mandates what they call an "actual" annual emissions test, *see* New York Br. at 8-9, 22-23, their own state NNSR rules are based on "potential" and "allowable" emissions tests. *See* N.Y. COMP. CODES R. & REGS. tit. 6, §§ 231-2.3(a), 231-2.1(b)(40); 25 PA. CODE §§ 127.211(a), 127.211(c)(1). Because the NNSR program shares an identical statutory definition of "modification" as PSD and NSPS, *see* 42 U.S.C. § 7501(4), their argument calls into question the validity of their own rules.

40.[27] On its face, the word "emitted" in section 7411(a)(4) serves merely to modify the word "pollutant," in order to distinguish between those pollutants that the existing source was already emitting prior to a change (and which would be "increased" by the change) and pollutants that the source had never "previously emitted" (but which it would emit following the change). Thus, neither the word "emitted," nor the entire phrase "amount of any air pollutant emitted," provides the clear statutory directive that Petitioners claim.

Petitioners are also wrong to suggest that Congress' use of the terms "emit," "potential to emit," and "emissions limitation" in other parts of the statute establishes Congress' intent to equate the unqualified words "emit," "emitted," or "emissions" to "actual" emissions. Pet. Br. at 49 (citing *New York*, 413 F.3d at 39). If Congress had intended the term "emit," "emitted," or "emission" to unambiguously refer to *actual* emissions only, it would not have needed to explicitly qualify references to emissions with the word "actual" elsewhere in the statute. But Congress did so—in 1970, in 1977, and again in 1990. For instance, in 1970, Congress added section 7521(b)(1)(B), which specifically required rules under section 7521(a) to include standards requiring "a reduction of a least 90 percentum from the average of *emissions* of oxides of nitrogen *actually* measured from light duty vehicles . . . ." (Emphasis added.) Similarly, in 1977, Congress added section 7502(c)(3) (originally section 7502(b)(4)), which specified that a state's emissions inventory is to be based on "*actual* emissions." (Emphasis added.) In 1990, Congress amended the definition of "modification" in the hazardous air pollution section in the statute, changing it from a cross-reference to the § 7411 definition of

---

[27] The United States has convincingly explained the D.C. Circuit's error in this regard. *See* U.S. Br. at 47-48 n.18; EPA's Pet. for Rehearing or Rehearing En Banc, *New York v. Envtl. Prot. Agency*, No. 02-1387 (Aug. 8, 2005).

"modification" to a new definition that explicitly references "actual emissions." *See* 42 U.S.C. § 7412(a)(5) (1990). If the section 7411 definition already unambiguously referred to "actual" emissions, there would have been no reason for Congress to qualify the word "emission" with the word "actual" as it did in these other provisions.

Finally and decisively, the very D.C. Circuit decision that Petitioners and their amici rely on *upheld* an NSPS provision using the maximum hourly emission test they find so objectionable. Specifically, the court upheld a revision adopted by EPA in 1992 defining "modification" as an increase in the "maximum hourly emissions of any pollutant . . . above the maximum hourly emissions achievable at that unit during the 5 years prior to the change." *New York*, 413 F.3d at 27 ("Environmental petitioners' . . . contention that the 1992 rule violates the statutory term 'any' by excluding some emissions-increases changes from NSPS fails . . . ."); *see also* 40 C.F.R. § 60.14(h); 57 Fed. Reg. 32,339 (July 21, 1992). In fact, for over thirty years "modification" under NSPS has meant only activity that increases the hourly rate of emissions, and that test has never been questioned by any court. *See* 40 Fed. Reg. at 58,416-19; 39 Fed. Reg. at 36,946-47.[28] If such an hourly test is permissible for NSPS, it must be permissible for NSR, as the two programs share the exact same statutory definition of "modification."

## CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit should be affirmed.

---

[28] Many aspects of the 1975 NSPS rules were challenged in *ASARCO Inc. v. Envtl. Prot. Agency*, 578 F.2d 319 (D.C. Cir. 1978). No one challenged, and the court did not question, the hourly emissions rate test in those rules.

Respectfully submitted,

STEVEN G. MCKINNEY
MICHAEL D. FREEMAN
P. STEPHEN GIDIERE III *
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 2600
Birmingham, Alabama 35203
(205) 251-8100

* Counsel of Record

*Counsel for Amici Curiae American Electric Power Company, Inc., Edison Electric Institute, Southern Company, and Utility Air Regulatory Group*

September 15, 2006